In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 877

NATHANIEL PRESLEY DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

An indictment returned in the United States District Court for the Eastern District of North Carolina charged that, on September 1, 1964, petitioner and five co-defendants: (1) possessed and had under their control an unregistered distillery, in violation of 26 U.S.C. 5179; (2) worked at a distillery on which no sign was placed, in violation of 26 U.S.C. 5180; (3) made or caused to be made mash for the production of distilled spirits at an illicit distillery, in violation of 26 U.S.C. 5601(a)(7); (4) possessed specified property intended for use at an illicit distillery, in violation of 26 U.S.C. 5686(a); and (5)

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removed, deposited and concealed non-taxpaid whiskey with intent to evade the tax imposed thereon, in violation of 26 U.S.C. 7206(4) (1 R. 8–9). At his first trial in March 1964, petitioner was acquitted on all counts except count 2, as to which the jury disagreed, resulting in a mistrial on that count (1 R. 2). Petitioner's motion to bar retrial, on grounds of former jeopardy and collateral estoppel, was denied. Upon his retrial, on count 2, petitioner was convicted and sentenced to one year's imprisonment and a $500 fine, with commitment under 18 U.S.C. 3651 for a period of six months and probation for a period of three years thereafter (1 R. 8–9, 17). The court of appeals affirmed, one judge dissenting.

The evidence, which was substantially the same as that given at the first trial, showed that investigators for the Alcohol and Tobacco Tax Unit of the Treasury Department observed petitioner by telescope, from a distance of about fifty yards, at an unregistered still in the woods of Franklin County, North Carolina. He was seen bending over a "catch tub" under the condenser, pouring whiskey from a foot tub into a barrel and pouring malt into the fermenting barrels (4 R. 4–5, 7, 27–28, 30, 40–41, 63–66).[1] A few minutes after these observations, the officers raided the still and arrested the other defendants. One man, whom they were unable to identify, escaped into the

[1] As noted in footnote 3 of the opinion below (Pet. App. 5A), the testimony that petitioner was seen pouring whiskey into a liquor barrel was not given at the first trial.

woods (4 R. 75). No sign was posted on the premises (4 R. 5–6, 31).[2]

Petitioner's acquittal on several counts of a multi-count indictment does not bar, on collateral estoppel grounds, his retrial on another count with respect to which the jury disagreed. The doctrine of collateral estoppel makes conclusive in subsequent proceedings only determinations of fact, or of mixed questions of law and fact, essential to the prior decision. *Yates* v. *United States,* 354 U.S. 298, 336; *Hoag* v. *New Jersey,* 356 U.S. 464, 470–471. Here, as held by the court below (which assumed that the doctrine applied),[3] the acquittal of petitioner on various counts

[2] All of the government evidence at the second trial was objected to on the ground of collateral estoppel (4 R. 2). Petitioner's motions to dismiss and to strike all government evidence were also denied (4 R. 82).

[3] It is arguable that the doctrine of collateral estoppel has no application to retrial after a prior jury has acquitted on some counts of a multi-count indictment and disagreed as to others. The fundamental rationale of the collateral estoppel principle is that one jury (or other finder of fact) should not be allowed to overturn the facts previously found by another jury. But when the first jury does not reach agreement on the counts to be retried, this rationale cannot be easily applied. It is clear that, if the first jury convicted on some counts and disagreed or acquitted on others, the conviction would not be set aside even if the verdict were logically inconsistent. Since the retrial on the counts as to which the first jury disagreed is, in effect, merely a continuation of the first trial, there is no more reason to require consistency of the verdict in the second trial than there is in the first. The collateral estoppel principle was, however, held to apply to retrial after disagreement as to some counts in *Cosgrove* v. *United States,* 224 F. 2d 146 (C.A. 9).

did not carry the necessary implication that petitioner was not identified as being present at the still (Pet. App. 10A). The jury could well have believed, as to counts 1 and 4, charging possession of the still and still equipment, that petitioner was present but did not have the custody or control charged. Cf. *Bozza* v. *United States,* 330 U.S. 160, 163. As to count 3, the jury similarly could well have concluded that petitioner was present but that none of the things which he was observed doing proved beyond a reasonable doubt that he made (or caused to be made) the mash found at the still. The fifth count charged that petitioner removed, deposited and concealed 586 gallons of non-taxpaid whiskey. While proof of any one of these three acts would have supported conviction (see *Crain* v. *United States,* 162 U.S. 625, 634–636; *Price* v. *United States,* 150 F. 2d 283, 285 (C.A. 5)), the charge was in the conjunctive, so that the jury could rationally have believed that a finding of all three was necessary to convict on this count (see Pet. App. 7A–9A). The observed actions of petitioner would scarcely support the charges either of concealment or of removing, and do not necessarily amount to depositing, so that acquittal on this count did not necessarily imply the jury's disbelief in his presence at the still. The observed actions showed clearly only that the person observed was working at the distillery. The first jury's inability to reach a verdict on count 2 is rationally explainable as indicating that there was no determination as to whether petitioner

was the person so observed.[4] The second jury in this case thus did not overrule the finding of the first jury but, as in any case of retrial after disagreement, reached a conclusion on a matter not previously determined. Contrary to petitioner's assertion (Pet. 10–11), the government did not prove his guilt at the second trial "by asserting facts necessarily determined against it on the first trial * * *," *United States* v. *Kramer*, 289 F. 2d 909, 916 (C.A. 2).

The decision below, which assumed that the doctrine of collateral estoppel was applicable to this case, in no way conflicts with the *Kramer* case or the other decisions cited by petitioner. Rather, it represents simply a proper application of the principles stated in those cases to the particular facts of this case.[5] There is thus no occasion for further review by this Court.

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[4] The dissent below gave weight to the trial court's instructions, pursuant to 26 U.S.C. 5601(b)(1) and (3), that presence alone at the still site would support a conviction on counts 1 and 3. However, this was only a permissible, not a necessary, inference. And the first jury's inability to agree as to count 2 indicates that at least some of those jurors rejected, rather than accepted, petitioner's testimony that he was not present at the still site. Had that count been the only one involved in the first trial, with the jury unable to agree, no question about the propriety of a retrial could conceivably be raised.

[5] Since petitioner was not acquitted on count 2 in the first trial, his double jeopardy argument (Pet. 10) is without merit (see Pet. App. 3A).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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